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TO: HEALTH INSURERS, HEALTH MAINTENANCE ORGANIZATIONS, HEALTH CARE PRODUCERS, AND
OTHER INTERESTED PERSONS

FROM: ARKANSAS INSURANCE DEPARTMENT

SUBJECT: CALCULATION OF EMPLOYEES FOR PURPOSES OF SMALL GROUP RATING

DATE: JANUARY 8, 2021

The Arkansas Insurance Department ("Department") has received several inquiries from health insurance carriers which issue small group and large group health insurance products in this State asking: (1) for purposes of determining an employer's group size for rating purposes, is the term "employee" governed by Federal or Arkansas law?; and (2) what time period does an employer use to determine the number or employees that it employs?

The Department advises health carriers that it intends to follow the interpretation and analysis of the Mississippi Insurance Department in Mississippi Insurance Department Bulletin 2016-9, "Clarification On How And When Employees Must Be Counted For The Purposes Of Determining Group Health Plan Size," <https://www.mid.ms.gov/legal/bulletins/20169bul.pdf> to be consistent with Federal law.

The Department has become aware that carriers may be using or relying on different definitions of the term, "employee" when calculating a group's size for purposes of small group rating.

Federal Statutes

Following the passage of both the Affordable Care Act ("ACA") and recently passed Protecting Affordable Coverage for Employee's ("PACE") Act, current federal law provides the following applicable definitions:

The term "small employer" means, "in connection with a group health plan with respect to a calendar and a plan year, an employer who employed an average of at least 1 but not more than 50 employees on business days during the preceding calendar year and who employs at least 1 employee on the first day of the plan year. A State may elect to define small employer by substituting '100 employees' for '50 employees'..."

The term “large employer” means, “in connection with a group health plan with respect to a calendar year and plan year, an employer who employed an average of at least 51 employees on business days during the preceding calendar year and who employs at least two employees on the first day of the plan year.”

The term “employee” is defined to have the meaning given “to the term under section 3(6) of ERISA.”

ERISA defines employee as “any individual employed by an employer.”

Such definitions are found at Public Health Service Act (“PHS Act”) section 2791. It is worth noting that section 1304 of the ACA contains similar definitions for “small employer” and “large employer,” but it does not contain a comparable definition for “employee.”

Federal Guidance

Although the plain language in the federal definition of “employee” means “any employee” (e.g. full-time and part-time), prior disputes over the term’s meaning have occurred due to conflicting State law definitions. In 1999, the Health Care Financing Administration (“HCFA” which is the previous name of the Centers for Medicare and Medicaid Services “CMS” (the HCFA will hereafter be referred to as CMS)) published a bulletin containing its interpretation of the term “employee” for purposes of the PHS Act in response to such a conflict. In the bulletin (Transmittal No. 99-03¹), CMS explained that any employee of an employer must be counted when determining employer size under the PHS Act, regardless of whether the employee is full-time or part-time. It also clarified that where Federal and State definitions of “employee” conflicted, if the State’s definition prevented the application of the Federal requirement, the State law was preempted. This same limitation was included in the implementing regulations of the PHS Act amendments made by the ACA.

Arkansas Statutes

In our small group rating law (Ark. Code Ann. §§ 23-86-201 et seq), Arkansas defines a “small employer” in Ark. Code Ann. § 23-86-202(12)(A) to mean, any person, firm corporation, partnership, or association actively engaged in business that, on at least fifty percent (50%) of its working days during the preceding year employed no fewer than two (2) nor more than twenty-five (25) eligible employees, the majority of whom were employed within the state.

Interpretation and Enforcement

It is the Department’s position that the Federal definition of “employee under the PHS Act, and as defined in ERISA, must be used when determining group size for rating purposes. Therefore, carriers should calculate the “average total number of employees” for the employer, without regard to the number of hours the employee works, when determining group size for rating purposes (i.e. the “ATNE” method). The Department believes that Arkansas’ current statute, which defines what employees may be counted when determining whether an entity is a small employer (i.e. the EE method), conflicts with Federal law. Because the ACA did not change the ERISA definition of “employee,” it is the Department’s position that previous interpretations of that term (i.e. the Federal Guidance released by CMS) may still be relied on to the extent the interpretation has not been superseded by other agency declarations or rule making.

¹ https://www.cms.gov/CCIIO/Resources/Files/Downloads/hipaa_99_03_508.pdf

Also, it is the Department's position that the average total number of employees an employer employed on business days during the preceding calendar year must be used when determining an employer's group size. The applicable Federal definitions of a small and large employer clearly require the preceding calendar year to be the time period used when determining an employer's group size, as opposed to the present calendar year.



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